DOCUMENT RESUME

ED 378 731 EC 303 628

AUTHOR	Hartz, Richard L.
TITLE	A Guided Introduction to the Employment Provisions of the Americans with Disabilities Act.
INSTITUTION	City Univ. of New York, N.Y. Bernard Baruch Coll. National Center for the Study of Collective Bargaining in Higher Education and the Professions.
REPORT NO	ISSN-0737-9285
PUB DATE	Oct 93
NOTE	12p.; The article is an edited version of a paper presented at the National Center for the Study of Collective Bargaining in Higher Education and the Professions Annual Conference (April 19, 1993).
AVAILABLE FROM	National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, 17 Lexington Ave., Box 322, New York, NY 10010 (annual subscription: $25 for four issues; single copy $6.25; free to Center members).
PUB TYPE	Collected Works - Serials (022)
JOURNAL CIT	National Center for the Study of Collective Bargaining in Higher Education and the Professions Newsletter; v21 n3 Sep-Oct 1993
EDRS PRICE	MF01/PC01 Plus Postage.
DESCRIPTORS	Civil Rights Legislation; *Compliance (Legal); *Disabilities; Employers; Employment Opportunities; *Equal Opportunities (Jobs); Federal Legislation; *Labor Legislation; *Legal Responsibility; Policy Formation; Public Policy
IDENTIFIERS	*Americans with Disabilities Act 1990

ABSTRACT

This newsletter theme issue outlines the intentions, concepts, and structures of the Americans with Disabilities Act (ADA) as it relates to employment. The article simplifies the provisions of Title I into the following statement: "If, despite my disability and despite some cost to be borne by my employer, I can perform the basic functions of the job I have or want, my disability is an unlawful reason for my employer to deny it to me or treat me differently from other, nondisabled employees." The particular provisions of the law are then outlined, including effective dates, covered employers, protected individuals, covered physical or mental impairments, when protections apply, essential functions of a job, reasonable accommodation, exclusion for illegal use of drugs, prohibited conduct, pre-employment inquiries and medical exams, qualification standards, and enforcement and penalties. Employers are encouraged to view their ADA responsibilities not as legal limitations but as a challenge to deal with individuals with disabilities on their own terms in the workforce and the workplace as never before. (JDD)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

ED 378 731

A Guided Introduction to the Employment Provisions of the Americans with Disabilities Act

Richard L. Hartz

National Center for the Study of Collective Bargaining in Higher Education and the Professions
Baruch College
City University of New York
Vol. 21, No. 3
Sept/Oct 1993

EC 303628

PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Beth Johnson
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC).

BEST COPY AVAILABLE

NEWSLETTER
NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION AND THE PROFESSIONS

Published at Baruch College • City University of New York • Vol. 21, No. 3 • Sept/Oct 1993

A GUIDED INTRODUCTION TO THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Richard L. Hartz

Note: The following article is an edited version of a paper presented on April 19, 1993 at the National Center's Twenty-First Annual Conference. Views presented are those of the author.

INTRODUCTION: WHAT IS THE BIG DEAL?

Although, according to a recent report, there are just ten lawyers assisted by three paralegals at the U.S. Department of Justice responsible for enforcing the non-employment provisions of the Americans with Disabilities Act (ADA), both employers and employees can rest assured that there are thousands of Equal Employment Opportunity Commission staffers engaged in a nationwide effort to enforce the new law insofar as it regulates the interface of the disabled with employment and the workplace. Depending on your point of view, this may or may not be a good thing, the act itself may or may not be wise law-making. From my point of view as a labor and employment lawyer -- and from that of the EEOC, where disability discrimination charges are reportedly being filed against employers at the rate of 1,000 per month -- the new act is in any event a very important thing.

As the culmination of the development of legal protections for disabled individuals over the last twenty years or so, the ADA may be ignored by no sensible employer. My role today is to educate you about the ADA's intentions, concepts and structures as they relate to employment. If, as many observers believe, the Americans with Disabilities Act is the most significant piece of Civil Rights legislation since the Civil Rights Act of 1964, our time today will be worthwhile.

Richard L. Hartz is an attorney with Anderson, Kill, Olick, and Oshinsky, P.C., New York City.

LEGISLATIVE INTENT: WHAT IS THE POINT?

In the ADA's employment section, Title I, Congress enacted a sea-charge concerning the obligations of the nation's employers regarding the estimated 43 million individuals with disabilities. Unlike predecessor federal statues like the Rehabilitation Act of 1973, a covered employer is obligated not to discriminate against a qualified disabled individual whether or not the employer is a government contractor or sub-contractor or is a recipient of federal funds. In other words, the vast majority of purely private employers, who previously had no such obligation under federal law, are now prohibited from disability discrimination. Congress decided to require that disabled individuals who are able to perform a job's essential function must be permitted to do so basically on the same terms and in the same places as their non-disabled peers. Thus, the ADA aims toward the complete integration of disabled people into the nation's employment system and setting. As is becoming more and more evident, employability and employment are the *sine qua no* of economic success in America. The ADA aims to bring to the sizeable disabled minority population the fullest employability, as

TABLE OF CONTENTS

A Guided Introduction to the Employment Provisions of the Americans With Disabilities Act..... 1
Effective Dates and Covered Employers..... 2
Protected Individuals..... 2
Covered Physical or Mental Impairments..... 3
Determining Status as a "Qualified Individual"..... 4
Exclusion for Illegal Use of Drugs..... 6
Prohibited Conduct..... 7
Defenses: What Can the Employer Rely On..... 9
Enforcement and Penalties..... 10

enjoyed by the non-disabled, shifting the cost burden to the employer.

STATUTORY SCHEME: HOW DOES IT WORK?

Oversimplified, it works this way: If, despite my disability and despite some cost to be borne by my employer, I can perform the basic functions of the job I have or want, my disability is an unlawful reason for my employer to deny it to me or treat me differently from other, non-disabled employees. The basic particulars follow:

A. Effective Dates and Covered Employers: What Employers Does it Cover and When?

The Americans with Disabilities Act was signed into law by President Bush on July 26, 1990.

Several ADA provisions, such as Title II, dealing with disability discrimination in providing services by public entities like state and local governments and most of Title III, dealing with private entities maintaining public accommodations, commercial facilities and transportation services, became effective on January 26, 1992. Other parts, such as those relating to newly constructed facilities and a provision regarding the telecommunications industry, became effective July 26, 1993.

But Title I, the employment provision, became effective for all covered private and public employers with twenty-five or more employees on July 26, 1992. The net will widen when, on July 26, 1994, the ADA becomes effective for those with fifteen or more employees.

The requirements of Title I apply to a "covered entity," meaning:

> ... an employer, employment agency, labor organization, or joint labor management committee.

As stated, eventually, all private and public employers with fifteen or more employees will be subject to the requirements of Title I of the ADA as it is phased-in.

Because the definition of the term "employer" found in the ADA is nearly identical to that contained in Title VII of the Civil Rights Act of 1964, the EEOC -- the federal agency with responsibility for enforcing the employment title of the law -- will give that term essentially the same meaning under the ADA as under Title VII. The federal government, which is subject to the Rehabilitation Act of 1973, Indian Tribes and bona fide tax-exempt private membership clubs are not considered employers under the Act.

B. Protected Individuals: What People are Covered?

The protected class under the ADA is composed of any employee or applicant for employment who is a "qualified individual with a disability." (EEOC Regulations at 29 C.F.R.§ 1630.4). There are three discrete concepts in the definition of the protected class under the ADA. First, an individual must have a disability in the sense that he or she has a "physical or mental impairment." Second, that impairment must be such that it "substantially limits one or more of the major life activities" of the individual. Finally, despite that impairment, the individual must be "qualified" for the position in question, in that he/she can perform "the essential functions of the position that such individual holds or desires." Several general observations are in order.

First, the determination whether each required element of the definition of a protected individual is present will "of necessity ... be made on a case-by-case basis." (56 Fed. Reg. 35726). It is entirely possible that an individual who would be deemed a "qualified individual with a disability" vis-a-vis one employer would not be deemed such an individual as regards to another employer. Different legal conclusions as to the protected status of an individual will be reached where there are differences in such factors as the geographic area where the employer is located; the field of employment involved; and, the size and financial condition of the particular employer.

Second, it is not necessary that a person currently be suffering from any mental or physical impairment to be within the protected class. In the Act, the term 'disability' means, with respect to an individual --

(a) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(b) A record of such impairment; or

(c) Being regarded as having such an impairment.

Thus, the ADA specifically protects individuals who have "a record of such impairment" or who are "regarded as having such an impairment." According to the EEOC's regulations, the former situation occurs where an individual is not currently suffering from a covered impairment, but "has a history of, or has been misclassified as having, a mental or physical impairment." (29 C.F.R. § 1630.2 (k)). The latter situation occurs where an individual has a mental or physical impairment that substantially limits a major life activity only because of the manner in which it is treated by a covered entity or as the result of attitudes of others towards the impairment. This latter situation may also occur where an individual has no impairment but is treated by a covered entity as if such an impairment exists. So, "an individual rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities would be covered under this part of the definition of a disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability." (56 Fed. Reg. 35743).

Finally, in certain circumstances, individuals will be in the protected class based solely on their relationship to a disabled individual. Section 1630.8 of the EEOC's regulations states:

> It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.

This protection would be available to one who is refused employment because of the employer's belief that the individual would have to miss work or frequently leave work early in order to care for a disabled spouse. The provision covers not only the fact of employment, but also all other benefits and privileges of employment. The EEOC has noted that this aspect of the ADA would prohibit an employer from reducing the level of health insurance benefits to an employee simply because that employee has a dependent with a disability, even if the result is increased health insurance costs for the employer. (56 Fed. Reg. 35747).

However, individuals protected solely based on an association with another disabled individual do not have full ADA protections. Specifically, an employer does not have to provide this non-disabled employee with reasonable accommodation because that duty only applies to qualified applicants or employees with disabilities. Hence, there would be no obligation for an employer to alter the work schedule of a non-disabled employee to enable that employee to attend to the needs of a disabled spouse.

Also, citizenship status or nationality is irrelevant. ADA protections are not limited to American citizens, but extend equally to authorized aliens and even illegal aliens. (56 Fed. Reg. 35740).

C. Covered Physical or Mental Impairments: What Disabilities are Covered?

The ADA was intended to protect people with a broad range of disabilities, both mental and physical. The EEOC Regulations define the term "physical or mental impairment" as:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletical; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. (29 C.F.R. § 1630.2 (h)). But, specific exclusions limit the breadth of this definition.

The ADA specifically excludes from the definition of "disability" various sexual preferences and sexual behavioral disorders, such as transvestism, transsexualism, homosexuality, bisexuality, pedophilia, exhibitionism and voyeurism, as well as compulsive gambling, cleptomania and pyromania.

It is also important to distinguish between "conditions that are impairments and physical, psychological, environmental, cultural and economic

characteristics that are not impairments." (56 Fed. Reg. 35741). According to the EEOC, the term "impairment" does not include: Physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone within "normal" range, and are not the result of a physiological disorder; characteristic predisposition to illness or disease; pregnancy; common personality traits such as poor judgment or a quick temper, where these are not symptoms of a mental or psychological disorder; environmental, cultural or economic disadvantage such as poverty, lack of education or prison record; and advanced age, in and of itself.

Significantly, the definition of disability also requires that a physical or mental impairment must substantially limit one or more of the individual's major life activities. The EEOC has noted that "many impairments do not impact an individual's life to the degree that they constitute disabling impairments." "Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors." (56 Fed. Reg. 35741).

"Major life activities" include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. (29 C.F.R.§ 1630.2 (i)). A major life activity will generally not be substantially limited by a "temporary, nonchronic impairment of short duration, with little or no longterm permanent impact," such as "broken limbs, sprained joints, concussions, appendicitis, and influenza." (56 Fed. Reg. 35741). Further, determination of whether an individual's impairment substantially limits a major life activity is to be made on the basis of a comparison with the abilities of "the average person in the general population."

Where an individual is not substantially limited with respect to any other major life activity, it then becomes necessary to determine the individual's ability to perform the major life activity of working. The following factors are to be considered:

(1) The geographical area to which the individual has reasonable access;

(2) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes). 29 C.F.R. § 1630.2 (j) (3) (ii). The EEOC regulations state that an individual is substantially limited in the major activity of working where he or she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training skills and abilities." (29 C.F.R. § 1630.2 (j) (3) (i)). But, "an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent." (56 Fed. Reg. 35742).

D. Determining Status as a "Qualified Individual": When do the Protections Apply?

Obviously, being "disabled" does not guarantee employment of choice, even under the ADA. In addition to being disabled, the individual must be "qualified" for the job in question before the protections of the ADA are triggered.

"Qualified" has a special meaning in the context of the concept "qualified individual with a disability," which means:

> An individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

In the EEOC's regulations, a disabled individual is "qualified" where he:

> satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, who, with or without reasonable accommodation, can perform the essential functions of such position. (29 C.F.R. § 1630.2 (m)).

These definitions restrict employers' freedom to determine how to judge whether an employee or applicant is "qualified" for a particular opening in two important ways. First, employers must make judgments solely on the person's ability to perform the "essential functions" of the job. By implication, there may be aspects or duties of a job than an employer would like to see accomplished and which have always been included in the job, but which a court would later deem "non-essential." An employer may be found to have violated the ADA if it excluded a disabled individual from the job in question based upon his or her inability to perform "non-essential" elements of the job.

Second, an employer may not judge an individual's ability to perform the essential functions of a job solely in the context of the job's present configuration or the employer's present personnel practices. Rather the employer must, in certain circumstances, alter a job's present configuration or its present personnel practices to accommodate the disability, thereby allowing the person to perform a job which otherwise he could not.

In addition, the EEOC has cautioned that the determination must be "based on the capabilities of the individual with a disability at the time of the employment decision, and should not be based on speculation that the employee may become unable in the future or may cause increased health insurance premiums or workers' compensation costs." (56 Fed. Reg. 35743).

(1) Essential Functions of a Job: What About the Job Really Count?

In general, "essential functions" means fundamental, basic, necessary, or vital duties of the job, not marginal functions. A job function may be considered "essential" for any of the following reasons:

(i) The reason the position exists is to perform that function;

(ii) Because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) Because the function may be highly specialized so that the incumbent in the position is hired for his or her expertise, or ability to perform the particular function. (29 C.F.R. § 1630.2 (n)).

The following types of evidence should be considered:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or,

(vii) The current work experience of incumbents in similar jobs.(29 C.F.R. § 1630.2 (n) (3)).

The EEOC has tried to allay employers fears that it will soon be instructing businesses on the details of their operations:

> It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower those standards.... If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words

per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement. (56 Fed. Reg. 35743-44).

(2) Reasonable Accommodation and Undue Hardship: How Far Does the Employer Have to Go?

The ADA defines "reasonable accommodation" with examples of the type of affirmative actions an employer may be required to take to allow an individual to perform the essential functions of a job. These include: (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; (2) job restructuring; (3) initiating part-time or modified work schedules; (4) re-assigning a disabled individual to a vacant position; (5) acquiring or modifying equipment or devices; (6) appropriately adjusting or modifying examinations, training materials or policies; (7) providing qualified readers or interpreters; and (8) other similar accommodations for individuals with disabilities. In general, an accommodation is any change in the work environment that gives a disabled individual equal employment opportunities.

Clearly, reasonable accommodation is very fact-specific designed to meet the person's needs and the job's requirements. An employer's duty to make reasonable accommodations to disabled individuals extends to all employment decisions, not just hiring and promotion.

The ADA makes failing to make reasonable accommodation unlawful discrimination unless the employer can show "undue hardship." "Undue hardship" is, in turn, defined as "an action requiring significant difficulty or expense" when considered in light of the following factors:

(1) The nature and the cost of the accommodation;

(2) The overall financial resources of the facility involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on resources and expenses, or the impact otherwise of such accommodation upon the operation of the facility;

(3) The overall financial resources of the employer; the overall size of the employer with respect to the number of employees; the number, type and location of the facilities; and,

(4) The type of operation of the employer, including the composition, structure, and functions of the workforce of the employer; the geographical separateness, administrative, or fiscal relationship of the facility in question to the total employer.

An important fifth factor involves: "The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business." (29 C.F.R. § 1630.2 (d) (1)). In this regard, while a collective bargaining agreement may not be used to accomplish what the ADA would otherwise prohibit, it may be a factor in determining whether a particular accommodation is a reasonable one.

E. Exclusion for Illegal Use of Drugs: Are Substance Abusers Protected?

The ADA states: "For purposes of this title, the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." Accordingly, an employer has a right to refuse to hire, or to fire people based on their current use of illegal drugs.

Several points are apparent. First, employers have a seemingly unfettered right to exclude current illegal drug users from employment if that action is taken on that basis. This is so even where an employer can make no showing that the drug use was affecting the employee's ability to perform the job.

Second, the drug use must be "illegal," which is defined as:

> ... the use of drugs, the possession or distribution of which is unlawful under the Controlled Substance Act (21 U.S.C. 812). Such term does not include the use of drugs taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substance Act or other provisions of federal law. (Section 101 (6)).

Thus, employees or applicants may not be excluded from a job because they are taking prescription medication. Of course, if the side effects of that medication prevent the individual from performing the essential functions of the job with or without reasonable accommodation, the individual may be excluded on that basis.

Third, the illegal drug use must be "current," a term not explicitly defined. Successfully rehabilitated former drug users, as well as those currently enrolled in a supervised drug rehabilitation program and who are no longer engaging in such use, are not excluded from the Act's protections. (29 C.F.R. § 1630.3 (b)). With regard to the phrase "currently engaging," the EEOC has said:

> The term "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct. (56 Fed. Reg. 35745-46.)

Fourth, if an employer erroneously excludes someone from employment on the basis of current use of illegal drugs, such an individual would be deemed a disabled individual, even though no mental or physical impairment is actually suffered. While this is consistent with the Act's inclusion in the protected class of those erroneously regarded as having such an impairment, it raises questions about the employers' reliance on the results of drug tests to make personnel decisions. The EEOC regulations state that to administer a drug test is not an ADA violation. (29 C.F.R. § 1630.3 (c)). Drug tests are also not considered medical examinations, some of which are largely curtailed under the ADA. (29 C.F.R. § 1630.16 (c)).

Lastly, it should be noted that the exclusion is for illegal drug users and does not apply to alcohol abusers. While an employer may prohibit employees from consuming or being under the influence of alcohol in the workplace and may hold alcohol abusers to the same performance and conduct standards as other employees, an employer may not take adverse action against an applicant or employee based upon alcohol abuse during off-duty hours. Moreover, where an employee's consumption of alcohol during working hours is due to the disease of alcoholism (a covered impairment), an employer may be required to provide the employee the option of attending a rehabilitation program before discharge.

F. Prohibited Conduct: What Actions are Barred?

(1) Generally:

The ADA broadly prohibits covered employers from discriminating against a qualified disabled individual in any aspect of the employment relationship. The EEOC's regulations state that this prohibition applies to:

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, up-grading, promotion, award of tenure, demotion, transfer, lay-off, termination right of return from lay-off, and, rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

(g) Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities,and selection for leaves of absence of pursue training;

(h) Activities sponsored by a covered entity including social and recreational programs; and,

(i) Any other term, condition, or privilege of employment. (29 C.F.R. § 1630.4).

Certain specific types of discriminatory conduct are explicitly proscribed by regulation:

- To limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability. (29 C.F.R. § 1630.5);

- Participate in a contractual or other arrangement with a third party that has the effect of discriminating against the covered entity's employees or applicants (29 C.F.R. § 1630.6);

- Utilize standards, criteria or methods of administration that have the effect of discriminating on the basis of disability and which are not job related and consistent with business necessity (29 C.F.R. § 1630.7);

- Exclude or deny equal jobs or benefits to a qualified individual because he or she is known to have a family, business or social relationship with an individual who is disabled (29 C.F.R. § 1630.8);

- Fail to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability (29 C.F.R. § 1630.9 (a));

- Deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need to make a reasonable accommodation to that individual's impairment (29 C.F.R. § 1630.9 (b));

- Utilize qualification standards, tests or other selection criteria that have a disparate impact on the disabled and that are not justified as job related and consistent with business necessity (29 C.F.R. § 1630.10);

- Fail to select and administer employment tests in such a manner that the test results accurately reflect the skills or aptitude sought to be measured rather than the disability of the applicant (29 C.F.R. § 1630.11); or

- Retaliate against any individual because that individual has opposed any act made unlawful under the ADA or because such individual has participated in any proceedings to enforce any provision of the ADA (29 C.F.R. § 1630.12).

(2) Pre-Employment Inquiries and Medical Exams

The EEOC states that "an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process," and that an employer may not "inquire at the pre-offer stage about an applicant's worker's compensation history." (56 Fed. Reg. 35750). Yet, its implementing regulations do allow an employer to "make pre-employment inquiries into the ability of an applicant to perform job-related functions, and or ... ask an applicant to describe or demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions." (29 C.F.R. § 1630.14). Inquiry may be made about an applicant's ability to perform both marginal and essential functions of the job. However, none of these questions may be phrased in terms of disability.

The ADA expressly prohibits an employer from conducting any medical exams prior to the time an offer of employment is extended. This includes a prohibition against the use of an application form that lists a number of potentially disabling impairments and asks the applicant to check any he or she may have. (56 Fed. Reg. 35750). While an employer may not ask an applicant how often he or she will require leave for treatment as a result of a disability, the employer may state the attendance requirements and inquire as to whether the applicant can meet them. Physical agility tests are not medical examinations and so may be given at any point in the application or employment process. But, if such a test tended to screen out individuals with a disability, the employer would have to show the test to be job-related.

The ADA does allow post-offer medical exams, and employers can condition the job offer on passing that exam, provided: (1) The employer must offer all entering employees in the same job classification the same examination; (2) The employer must place information regarding medical history in a separate, confidential file; and, (3) The employer must not use the medical information to discriminate against the applicant. Some exceptions to the confidentiality requirement exist for supervisors or managers in some cases, for first aid and safety personnel, and, of course, for government officials. (56 Fed. Reg. 35751).

An employer cannot use medical examination results to discriminate against a person with a disability if that person is still qualified for the job. However, if the employer discovers from the examination that the candidate poses a high probability of substantial harm to himself or others in performing the job, the employer may reject the candidate, unless reasonable accommodations without undue hardships could be provided. Unless an employer can prove that an exam is job-related and consistent with business necessity, the employer cannot reject an applicant based on a pre-employment medical exam.

After hire, an employer cannot require a medical examination, inquire about disabilities, or inquire about the nature and severity of a disability unless the exam or inquiry is job-related and consistent with business necessity, as in fitness for duty exams to ascertain if an employee is still able to perform the essential functions of the job. (56 Fed. Reg. 35751). An employer may inquire at any time into the employee's ability to perform job-related functions. Voluntary medical examinations, including voluntary medical histories, as part of an employee health program, are acceptable.

G. Defenses: What Can the Employer Rely On?

There are several explicit affirmative defenses to charges of disability discrimination. Undoubtedly, employers will bear the burden of proof on these defenses. In addition, several other defenses are implied. In creating them, Congress drew upon concepts and terminology that have been extensively litigated under other federal fair employment laws, particularly Title VII. These defenses will likely be used in ADA litigation in ways similar to their use under other fair employment statutes.

(1) Business Necessity in General

The ADA states:

> It may be a defense to a charge of discrimination under this Act than an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title. (Section 103 (a)).

This provision codifies the business necessity defense developed under Title VII concerning the theory of disparate impact.

(2) Qualification Standards Based Upon Safety and Health Concerns

There is a special ADA rule for employment screening devices that may have a disparate impact on the disabled where such devices are designed to assure the safety of other employees:

> The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace. (Section 103 (b)).

Apparently, this was meant to codify Rehabilitation Act case law that permitted employers to exclude individuals from the workplace based upon the risk of future injury. The EEOC regulation (29 C.F.R. § 1630.15) is broader because it states that the threat could be to the health or safety of the individual or others. Factors to consider include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and, (4) The imminence of the potential harm. (29 Fed. Reg. 35745).

It is clear that the employer cannot exclude an individual from the workplace because of a stereotype or speculation about the risk of harm to others. Decisions cannot be based on generalizations but, rather on the facts of an individual case. The purpose of creating the "direct threat" standard was to eliminate exclusions which are not based on objective evidence about the individual involved. A good example would be excluding an individual from a job because the employer assumes that someone with a mental disability poses a direct threat to others.

Employers must be extremely cautious when denying employment based on a risk of future injury. Employers should base decisions on careful medical examinations; studies of an individual's medical and work history, and, consideration of job duties. It should be established that a high probability of injury to the employee exists or there is substantial harm to others even after making reasonable accommodations.

While an employer can exclude an employee who poses a significant risk to others, this significant risk must be based on the current condition of the employee

or applicant and there must be actual proof. Furthermore, the "direct threat" standard does not allow an employer to circumvent the prohibition against pre-employment inquiries into a person's disability. In addition, it may not be used to justify pre-employment requests or inquiries related to medical records.

(3) Special Rules

Any employer may have "qualification standards" that exclude persons with a contagious disease or infection where that condition poses a direct threat to the health and safety of others in the workplace. But, the disease must pose a direct threat to the health and safety of others in the workplace which cannot be eliminated by reasonable accommodation. If an employee has an infectious disease that can be cured through medication over a period of time, the employer may be required to offer the employee time off to recover as reasonable accommodation, subject to "undue hardship" standards.

If an individual has "an infectious or communicable disease that is transmitted to others through the handling of food," the risk of which cannot be eliminated by reasonable accommodation, then the employer can "refuse to assign or continue to assign such individual to a job involving food handling." The disease must be on a list compiled by the Secretary of Health and Human Services of communicable diseases which may be transmitted through food handling.

H. Enforcement and Penalties: What Happens in Case of a Violation?

As stated, the EEOC, which has been enforcing Title VII and other federal employment discrimination statutes, is charged with enforcing the ADA. It has issued final regulations and interpretive guidance, much of which is cited here, and has available a Technical Assistance Manual of January 1992 as well.

The enforcement scheme is similar to that for Title VII. Employers must post appropriate notices. Aggrieved persons must file charges of discrimination with EEOC. Court-ordered remedies can include hiring, re-instatement, back pay, reasonable accommodation and other injunctive relief. Attorney's fees, litigation expenses and other costs may be awarded to prevailing claimants. Moreover, trial by jury is available and compensatory and punitive damages up to $300,000 will be available in some cases.

CONCLUSION: WHAT MORE CAN BE SAID?

If anything is clear by now, it is that the employment title of the Americans with Disabilities Act substantially expands the legal responsibility of the community of private employers in our country. Employers of all types and nearly of all sizes have to bear a very significant share of the weight of the federal legislative decision to bar private job discrimination based on non-disqualifying disabilities and to establish for the disabled truly equal employment opportunity.

Many physically disabled now take the view that their limitations are merely physical challenges. Perhaps employers can view their new ADA responsibilities not as legal limitations but, as a challenge to deal with the disabled on their own terms in the workforce and in the workplace as never before.

NATIONAL CENTER NEWSLETTER

A publication of the National Center issued four times per year. Annual subscription rate: $25; Single copy, $6.25; free to Center members. Back issues available. ISSN 0737-9285.

Editor and Director: Frank R. Annunziato

Administrative Director: Beth H. Johnson

Graduate Assistant: Johnny Lee

College Assistants: Israel Alvarez and Karen Daniel

Address all inquiries and contributions to NCSCBHEP, Baruch College, 17 Lexington Ave., Box 322, New York, N.Y., 10010, (212) 387-1510, fax (212) 387-1516.